STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Murphy, P.J., and Hoekstra and Markey, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 124996

JEROME L. KNIGHT,

Defendant-Appellant.

Court of Appeals No. 231845
Lower Court No. 99-002073-02

The People's Brief on Leave Granted

Oral Argument Requested

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Counter Statement of Question Involved

A party may not use a peremptory challenge to remove a potential juror based on race, and when properly challenged, must provide a race-neutral reason for the removal. The prosecutor's reasons for removing two African-American jurors were that one juror was hesitant in responding to the question whether she could be fair and also had a relative who had been convicted of a drug offense, and the other had a daughter who was the age of the victim. The prosecutor's reason were credible and supported by the record, and so, assuming that the trial court found that the prosecutor had engaged in intentional and purposeful discrimination, the trial court erred.

The People answer yes.
Defendant answers no.

Summary of Argument

The record is unclear whether the trial court actually found that the prosecutor had violated the ruling of *Batson* when the prosecutor peremptorily challenged jurors 2 and 9. If it is that the trial court found no violation, this finding was supported by the prosecutor's credible race-neutral explanations for the challenges. If, on the other hand, the trial court did find a *Batson* violation, this finding was clearly erroneous inasmuch as the prosecutor did give credible race-neutral explanations for the challenges which were supported by the record. Assuming, however, that there was a *Batson* violation, so that the trial court's decision to continue on with the trial was erroneous, any *Batson* violation was harmless error due to the presence of "the same number if not more" unchallenged African-American jurors who remained on the jury.

Counterstatement of Facts

Defendant, Jerome Knight, was charged along with a codefendant, Gregory Rice, in an Information with first-degree premeditated murder, pertaining to the death of Yahnika Hill, in violation of MCL 750.316; MSA 28.548. Codefendant Rice was also charged with a count of felony-firearm, in violation of MCL 750.227b; MSA 28.424(2). The matter came on for jury trial in the courtroom of the Honorable Cynthia Gary Hathaway.

Included among the testimony at trial was the following:

Clifford Fuller testified that on November 24, 1998, at about 6:15 a.m., he was driving his Cadillac Coup de Ville on Freud, on the east side of Detroit (The People's Appendix, 74b-75b). After he stopped for the traffic light at Dickerson and Freud, he noticed a car that was partially parked on the corner of the next street over, which was Emerson (75b). Before that, a small yellow or beige vehicle, which appeared to him to be a small Dodge, sped past him; the reason he took notice of this car was because this was a residential area and the car was going so fast (75b-76b). He drove past the car which was partially parked on Emerson and saw that the driver's door was open (77b). He then noticed that there was something in the street that appeared to be a body; the body was lying a few feet away from the car (77b-78b). When he got out of his car, he discovered that the partially parked car was still running, and it smelled of burning oil (78b). The body in the street was that of a female (79b). She was lying on her stomach with her head partially turned to the right and her arms up towards her shoulders with her hands balled up into fists (80b). He also noticed what appeared to be an employee I.D., with a picture and a name on it (81b). He could not pronounce the first name, but the female's last name was Hill (81b). He went to take her pulse and

noticed that her wrists were cold and stiff (83b). After a number of attempts to get help from neighbors and passers-by, he was able to flag down a bus and he asked the bus driver to call the police (84b-85b). He walked back to the partially parked vehicle and again noticed the smell of burning oil, so he reached into the car and turned the ignition and the headlights off (86b). He then just stood there and waited for the police (86b).

Two officers arrived in a patrol car five or six minutes later (86b). He gave the officers all the information he had, about how he had just seen the partially parked car and the female lying in the street (87b). One of the officers looked around the car and found bullet casings (88b).

On redirect examination, Fuller testified that there was a purse in the car (89b).

Detroit Police Officer George Ball testified that he was assigned to the Fifth Precinct (90b). He testified that on November 24, 1998, at about 7:00 a.m., he and his partner, Officer Paul Houtos, received a radio run to the location of Emerson and Freud (91b). They got to the location three minutes later (91b). As they drove down Emerson approaching Freud, he observed a car, a red Plymouth Sundance, with its door open (91b-92b). When they got closer, he could see the body of a woman in the street (92b-93b). The body was about 20 feet from the car door and five feet from the curb (92b). They went to the woman first to see if she was alive (93b). He saw blood near the woman's head and he called EMS (94b). He checked the woman's pulse but could not feel one (94b). He then looked around and saw one spent shell casing on the ground by the open car door of the Sundance (95b). He found another spent shell casing in the back seat of the car near a child's toy car (96b). He left these shell casings where they were for the Homicide investigator and the evidence technicians (97b). He also observed a couple spots of blood on the rocker panel of the driver's side of the car, and on the right front seat was a lady's purse; the purse appeared to be intact,

meaning that it was not open (98b). As to whether he saw any evidence that a gun was fired into the car, he saw what appeared to be a bullet hole on the passenger side, on the lower quarter panel of the car (99b). When EMS arrived, the woman's body was transported to St. John's Hospital (100b). He found out later that the woman was dead on arrival at the hospital (101b). The Sundance was towed away about an hour later (100b-101b).

There was a civilian, one Clifford Fuller, at the scene when he and his partner arrived (100b). He got this person's name and address and phone number (100b). Fuller stayed at the scene until he talked to the Homicide officer (101b).

On cross-examination by Defendant, Officer Ball was asked if he saw any tire marks on the body of the woman; he responded that he did not (102b).

Detroit Police Officer Paul Houtos testified that he was the partner of Officer George Ball (105b). He testified that when he and Officer Ball responded to the scene at Emerson and Freud on November 24, 1998, he observed the body of a young woman on the ground (104b-106b). One of the woman's arms was up in the air as if she had been crawling for something; her nylons were ripped at the knees and there was blood coming from her head region and her torso (106b). There was a photo I.D. laying in the street by the woman's body; he could not tell for sure that the woman depicted in the I.D. was the same woman in the street because of the blood, but they looked similar (107b-108b). The car he saw at the scene, the Plymouth Sundance, was parked a short distance from the curb; the driver's side door was open and the driver's side window was partially down (109b). Inside the car were a purse and some personal belongings; nothing looked like it had been rummaged through (111b). On the outside of the car, on the passenger door, was what appeared to be an exit bullet hole; he could tell this from the way the metal on the door was pushed out (115b).

Parneisha Jerry testified that Yahnika Hill had been her best friend for the last 18 years (117b). She also knew Defendant, whom she identified in court (117b). She met Defendant through Yahnika; Yahnika and Defendant had been a couple (boyfriend/girlfriend) in 1994 (118b). They broke up in late '97 or early '98 (118b). They lived together for a couple of months in 1997 (118b-119b).

She had had occasion to talk to Defendant on the telephone numerous times during the time Yahnika and Defendant had lived together (119b). Yahnika had a child, a boy, named Christopher Bennett (119b-120b). There was also an adult named Christopher Bennett, who was an ex-boyfriend of Yahnika's (120b). After Yahnika and Bennett broke up, they remained friends (120b-121b). Yahnika still spoke to Bennett on the phone, and Bennett would come over to Yahnika's house once in a while; in fact, the last time she saw Bennett was over at Yahnika's house in early November (121b-122b).

On the other hand, Yahnika's relationship with Defendant was bad in November of 1998 (124b). Before November, Defendant had had contact with the child Christopher Bennett, but only had contact with him once in November of 1998 (125b). The little boy's birthday was November 22, and Yahnika and a number of her friends and family had a party for him at Major Magic's on that date (126b). After the party, Yahnika dropped her off at her house; this was around 9:30 p.m. (127b). Between 10:30 and 11:00 p.m. that same night, Yahnika called her up on the telephone; Yahnika was upset (128b). Yahnika asked her to listen to something over the phone; Yahnika then played her a message she had received on her voice mail (128b). The voice on the voice mail was that of Defendant, whose voice she recognized (128b). The message Defendant left was this: "Bitch, I hate you, I'm going to kill you, you wouldn't let me see Jaylin for his birthday. I hate you,

bitch, I'm going to kill you." (129b). On the next day, November 23, Yahnika called her again, this time from a pay phone; this call occurred at about 6:00 or 7:00 p.m. (130b). Yahnika was upset and yelling and told her that Defendant had taken Jaylin from daycare; Yahnika asked her to call her father, which she did (130b). Yahnika then called her a second time on November 23; this was around 8:30 p.m. (130b). Yahnika was calmer now, and she asked her to call her pager and listen to her voice mail (47). She did this and what she heard was Defendant's voice again (131b). The message Defendant left on Yahnika's voice mail was the following: "Nah, nah, nah, nah, nah, bitch, you'll never see Jaylin again, nah, nah, nah, nah." (131b). At this juncture, the witness testified that the child was also called Jaylin (131b-132b). She testified that Defendant was one of the people who was authorized to pick the child up from day care (132b-133b). Later, in the early morning, at 12:30 a.m., on November 24th, Yahnika called her again on the phone and told her that she was not able to get Jaylin back; Yahnika was crying when she told her this (133b). That was the last time she talked to Yahnika (134b). She tried calling Yahnika later that morning between 7:00 and 7:30 a.m. at Yahnika's house (134b). She learned later that morning that Yahnika had been murdered (137b).

Yahnika was employed in November of 1998 at EDS (135b). She knew that Yahnika's routine was to leave the house between 6:15 and 6:30 a.m. on the days she worked (135b). Yahnika drove a red Dodge Shadow (135b). The witness identified Yahnika's employee I.D. in court (135b). The witness was asked if the child identified with anyone as a father figure; she responded that the child had such a relationship with Defendant (137b).

On cross-examination by Defendant, the witness was asked why she called Yahnika at 7:30 on November 24 if she knew that Yahnika left for work between 6:15 and 6:30 a.m.; the witness responded that Yahnika had told her that she was not going into work on the 24th (138b).

On cross-examination by Defendant, the witness testified that when Yahnika's child was born she named the child Christopher Bennett (139b). She testified that she was aware that in August of 1998, Yahnika filed a petition in the Wayne County Circuit Court naming Jerome Knight (Defendant) as the father, and that somewhere along the line the child's name became Jaylin Knight (139b-140b). She testified that as a result of the petition, Defendant was given visitation rights with the child and custody of the child Sundays to Tuesdays (140b-141b). Also on cross, the witness was asked if she knew if Defendant ever attacked Yahnika; she responded that that was what Yahnika told her (142b). She was asked if she knew if Yahnika ever went to court and got a personal protection order against Defendant; she responded that she did, in July, 1998 (143b-145b). She acknowledged that the order subsequently got dismissed (146b). She acknowledged having told the police in a written statement that Yahnika had had a problem with Christopher Bennett (the adult) two years before, because he saw Yahnika with another man, but at the time of her death they were "cool," and that they had gone out to dinner the Friday previous to her death (147b). She also acknowledged that there had been a dispute between Christopher Bennett and Yahnika about the custody of the child Jaylin (149b). Finally, she testified that she was aware that Yahnika was upset with Defendant because she had caught him with another woman, a woman named Nikki (148b).

On redirect examination, the witness testified that the problem Yahnika had with Bennett over the child was that she told Bennett that it was possible he was the father and she told Defendant that he was probably the father (150b-151b). This was in 1996 (151b). Also on redirect, the

witness testified that Yahnika told her that she was not going into work on November 24 because she was going to spend that day looking for Jaylin (152b). The witness reiterated that at the time of her death Yahnika was not having any problem with Christopher Bennett (152b).

Edward Eugene Petty testified that he knew Yahnika Hill through her father John Hill; he and John Hill knew each other by virtue of their employment at Detroit Edison (153b). He testified that he saw Yahnika Hill on the day before she died (154b). The circumstances were as follows:

At approximately 5:00 p.m., he and John Hill were together, on their way to work, when John Hill received a telephone call (154b). Hill said that the call was from his daughter, and that she told him that someone had kidnapped her child (154b). They arranged to meet Yahnika at a Total gas station at Fenkell and Meyers (155b). It took them 15 minutes to get to the location (155b). Yahnika was very upset and she said that she thought her ex-boyfriend, Jerome Knight (Defendant), had taken her child without her permission (156b). He did not know Defendant, and did not know what he looked like (156b). Yahnika wanted to go over to Defendant's house and find a way to get in the house to see if her child was there (157b). She pointed to Defendant's house, which they could see from the gas station (157b). At this point, John Hill called the police from his car phone (157b). After they waited for about an hour, John called his brother Sean, who was a Detroit police officer (157b-158b). When Sean arrived, Sean said that the best thing to do was to go to the police station and make a report (159b). They all drove, all four of them: Sean, Yahnika, John, and himself, to the police station at 7 Mile and Woodward; he and John were in John's car, and Yahnika and Sean were supposed to follow them in Yahnika's car (160b). Sean and Yahnika never showed up (160b). He and John Hill waited for them for about half an hour and they then decided to return to Meyers and Fenkell (161b). When they got there, Yahnika was on the sidewalk with her uncle

Sean and two uniformed police officers (161b). He heard one of the officers explaining that he had seen Defendant's papers, that Defendant had the proper papers to have custody of the child, and that they couldn't stand in front of Defendant's house (161b). Yahnika got more upset and she started screaming and swearing and saying that she was going to go into Defendant's house and get her child (162b). He and John Hill took Yahnika across the street and explained to her that the officers said that they would arrest her if she continued to stand in front of Defendant's house making noise and causing a disturbance (162b). While he and John Hill were talking to Yahnika, a man (whom the witness identified as Defendant) came out of the house; Yahnika said that that was Defendant (163b). Defendant went to the house two doors down and went inside and then came back to his own house (163b). Ten minutes later, Defendant came out of his own house and got into a Bronco (163b-164b). Defendant backed the vehicle out of his driveway and started up the street in the direction they were at (165b-166b). As Defendant came alongside of them in his vehicle, he heard Defendant lean over to the passengers side of his vehicle and shout the following out the open window, "I'm going to kill you, bitch" (166b). Defendant then accelerated and went down the street (166b).

On cross-examination by Defendant, the witness testified that when Defendant came down the street he was going slow and then he accelerated as he left (167b).

Sean Hill testified that he was Yahnika Hill's uncle, that John Hill was his brother (168b). He also testified that he was a Detroit Police Officer and had been for three years (168b-169b). He testified that he knew Defendant, having met him in the course of his niece's relationship with him (169b-170b).

He had occasion to see his niece on November 23, 1998; the circumstances were that at about 8:45 p.m., his brother John called him and told him that Defendant had kidnapped Jaylin out of day care (170b-171b). He told his brother to meet him at the Second Precinct to make out a kidnapping report (170b-172b). He met his brother, his niece, and his brother's friend, Mr. Petty, at the Second Precinct at about 9:00 p.m.; his niece was very upset (173b). The police at the Second Precinct told them that the address they were referring to as the house where the child might be, that being Defendant's house, was actually in the 12th Precinct (173b). They all left to go to the 12th Precinct; he drove in his own car, Yahnika followed him in her car, and John and Mr. Petty went in John's car (174b). John took a different route to the 12th Precinct, and so he and Yahnika lost John and Petty (174b). Yahnika continued following him and they saw a police scout car and he flagged it down (174b). He gave the officers Knight's address, and he and Yahnika followed the officers over to Defendant's house (176b). The scout car pulled up in front of Defendant's house, and he parked his car next to Defendant's house and Yahnika parked behind him (176b). The officers went up to Defendant's house and went inside (177b). When they came out, they told him and Yahnika that the person inside the house produced proper custody paperwork (177b). His niece was still upset, but when he and the officers talked to her, she accepted it (177b-178b). As he and the officers were explaining the custody papers to his niece, Defendant pulled up into his driveway in a green Ford Tempo (178b-180b). Defendant exited the vehicle and then exchanged words with Yahnika (181b). Yahnika told him that he better give her her baby back, and Defendant responded, "Bitch, you better go home 'cause you never going to get your baby back" (181b). Defendant then went in his house and the two officers also went in the house (181b). When the officers came back out, they told Yahnika that she could not get her child back that night and that she just needed to leave (182b).

By that time, his brother John had pulled up and parked (182b). The officers left and he and Yahnika walked over to where his brother was parked (182b). They all talked for a second, and then Defendant came out of his house and got into a Bronco and drove past them (182b-183b). Petty was closest to the street, about three feet from the Bronco when it went past them (184b). He himself was further away from the Bronco than Petty; he was six feet away (185b). Petty was just standing there listening (185b). Defendant then just drove by (185b). The four of them then stood there talking for ten or fifteen more minutes; John and Petty then left, and five or ten minutes later he and Yahnika left (186b-188b). He did not see Yahnika after that (188b). The next day, he went to the Homicide Section at about 1:15 p.m. and made a report about what had happened the night before; he thought that what happened was relevant to the case (189b).

John Hill testified that Yahnika Hill had been his daughter (191b). She had been 21 years old on November 24, 1998 (191b). He knew Defendant (191b). His daughter and Defendant had had a romantic relationship at one time, but they were no longer involved on November 24; he believed that their relationship ended in July of 1998 (192b). In the early part of 1998, she had lived with Defendant (192b-193b). She moved out in April and lived by herself with her son (193b). Her son's name was Christopher Bennett (193b); the child was also named Jaylin Knight – his daughter had been in the process of changing the child's name to this (194b). She had been pregnant with the child in 1997 (194b). At that time, she was seeing Christopher Bennett (the adult), but they were not on good terms (194b). She was also seeing Defendant at that time (195b). His daughter had a dispute with Bennett a year and half before the child was born, but they became friendly again and were on friendly terms up to the time she died (196b-197b). There was a time when there was a dispute over who the father of the child was (197b). When the child was six

months old, and his daughter and her son were living with him, Defendant came over to pick the child up; he told Defendant that he appreciated his wanting to act as a father figure to the child, but he did not think that Defendant was the father, and so he did not let the child go with Defendant (197b-198b; 200b).

When asked if he ever saw Defendant again in 1998, the witness responded that he did, on November 23, 1998 (201b). On that date, his daughter called him and asked him to meet her at a gas station across the street from where Defendant lived (201b). At that time, Defendant was allowed custody of the child on Sundays, but it was Defendant's sister who was supposed to pick the child up from his (the witness') house (202b). On that date, his daughter was supposed to pick up the child from day care, but when she went to pick him up, he had already been taken (203b-204b). His daughter was very upset and she told him that Defendant must have picked the child up (204b). He and his friend, Ed Petty, went to meet his daughter (204b). They met his daughter at a gas station (205b). She told him that she had called the police, but they hadn't arrived yet and it had been a while (205b). He decided to call his brother Sean who was a police officer and his brother came to the gas station (206b). They all then left to go to the nearest police station (206b). He and Petty got the police station and were told that that station did not cover the area they were talking about (206b). His brother and daughter never did show up at the police station, so he and Petty struck out to find them (207b). They went back to the gas station, and his brother and daughter were there (207b). When they arrived, his daughter was out in front of Knight's house, on the sidewalk, and his brother was talking to her; there was also a police scout car there (208b). When he got out of his vehicle and approached his daughter and brother, Defendant was out on his porch, and his daughter was screaming and directing comments to Defendant; Defendant just stood

on the porch smirking at her (209b-210b). Then one of the two police officers who had been flagged down by his brother talked to his daughter and asked him to take his daughter away; she was still upset (211b). He pulled his daughter across the street to where his car was parked and tried to calm her down (211b). As he was doing this, Defendant got in his truck, a Bronco, and drove past them (212b). Defendant yelled something at his daughter, which he could not make out, and his daughter asked him if he had heard what Defendant had said, but he hadn't heard (212b). Petty was closer to Defendant's vehicle than he and his daughter were; Petty was in the street (212b). He and Petty then went back to his house (213b). He never saw his daughter again (213b).

On November 24, at 11:00 a.m., he was informed that his daughter had been killed (214b). He subsequently identified his daughter's body at the Wayne County Medical Examiner's Office (214b).

Assistant Wayne County Medical Examiner John Scott Somerset testified that on November 25, 1998, he performed an autopsy on the body of Yahnika Hill, who was identified as being 22 years old (215b). His examination revealed four gunshot wounds and also abrasions on the right side of her face and on her left knee (216b). One gunshot wound was through the middle of her chest and it exited the right back; internally, the bullet went through her heart and right lung (216b). This was a through-and-through wound (217b). Another gunshot wound was to her left chest near the nipple; he was able to recover this bullet from her back (217b). This bullet went through the left lung (225b). The skin of the deceased showed no evidence of close range firing, but there could have been such evidence on the deceased's clothing, but he never got the clothing, and so he never inspected it (217b-219b). Both of the chest wounds caused massive internal bleeding (225b). There was a wound to the deceased's right hand that went through her palm; her hand did have soot

on it, indicating that this shot had been fired from a distance of 12 inches or less (220b). The fourth wound was through the left palm; the bullet went through the left wrist and exited the left forearm (220b). The hand wounds were through-and- through wounds, and so the bullets which caused these wounds were not recovered (220b). The hand wounds were consistent with being defensive wounds, meaning that the deceased might have put her hands up in a defensive posture when the shots were fired (221b-222b). There may have been only two shots fired; it is possible that the two bullets which went through the deceased's palms reentered her body (224b-225b). The abrasions to the deceased's face and knee were probably caused by her falling (222b-223b). The one bullet which was recovered was turned over to the police (226b-227b). On redirect examination, the witness testified that the wounds to the victim's chest were consistent with her sitting in a car at the time she was shot because the wound tracks went from left to right, so that if somebody was outside the vehicle and the victim was in the driver's seat, the wound tracks would be left to right (228b).

Detroit Police Evidence Technician David Babcock that on November 24, 1998, at about 8:00 a.m., he was called to a crime scene at Emerson and Freud (230b), which was on the lower east side of the City (232b). When he arrived at the scene, there were a number of police personnel there preserving the scene (231b). There was a red Plymouth Sundance there, which was what the victim had apparently been in (233b-234b). There was some scraping on the side of this vehicle, which appeared to be fairly fresh, as if the vehicle had been side-swiped, and the color of the scraping was lighter than the red vehicle, almost a beige color (235b). On the running board of the Sundance were droplets of a blood-colored substance, and on the pavement below this, along the seat edge area of the driver's side, was a fired 9 mm. casing (236b). He found another 9 mm. casing inside the car, laying on the seat cushion of the left rear passenger seat (237b). Also on this seat

was a small toy race car (237b). There was a purse on the right front passenger seat, and, when he moved the purse, he found a fired bullet on the right front passenger seat (238b). The purse was open at the top, but none of the personal effects inside the purse had any appearance of having been gone through; nothing was scattered around (241b). When the car was brought into the police garage for further inspection, he found another fired 9 mm. casing on the left rear floor (239b). By the positions of the three fired shell casings and the blood, it appeared to him as if the victim had been shot while inside the vehicle and had then left the vehicle (240b).

Stephanie Harris testified that she had a nephew named Rodney Coleman, who was 21 years old (243b). Coleman had lived with her for 18 years (243b-244b). In November of 1998, he lived on Monica (244b). She testified that she knew Defendant, whom she identified in court (244b-245b). She knew Defendant through her nephew; she would see him over at her nephew's house (244b-245b).

On November 26, 1998, she saw her nephew Rodney over at her brother's house; she remembered that this was the day because they were all over that her brother's house for his birthday (245b). When she saw Coleman, he was very agitated (245b). She asked him what was wrong, and he told her (245b). In December of 1998, she found out that her boyfriend Gerald Lewis and John Hill were best friends (246b-247b). She also found out at that time that something had happened to Yahnika Hill, John Hill's daughter (247b). She told her boyfriend what her nephew had told her (246b-247b). She ended up then giving the same information to the police, to Investigator Shaw, in February of 1999 (247b).

She also knew Defendant, whom she identified in court (248b). She knew him because he came by her house twice in February of 1999 (248b). The first time Defendant came by was on

February 13, 1999; she knew that this was the day because it was the day before Valentine's Day and her nephew was being held by the police that weekend for questioning (249b). He knocked on her door and asked if Rodney was home (249b). She told him he was not and he asked her if she knew when he would be in and she told him she did not know (249b). He asked her to tell Rodney that J.J. had been by (249b). The next day, Defendant came by again and knocked at the door and asked her again if her nephew was home (249b). On this occasion, her nephew was at her house, and he looked out the window and saw Defendant pull up in his truck; her nephew told her that that was J.J. (250b). She told Defendant that her nephew was not home, that he was still locked up – she told Defendant this for her nephew's own safety (250b).

Marlynda Mattison testified that she was Rodney Coleman's girlfriend (251b). She was asked if she knew Defendant and Defendant's codefendant, Gregory Rice; she responded that she did, and she identified them both in court (252b-253b). She knew Rice because Rodney and Rice were friends (262b-264b). As far as Defendant, the first time she met him was when Coleman introduced her to him in October of 1998 (253b). The circumstances of her meeting Defendant were that Defendant came by her house in a beige Buick Regal (254b-255b). She and Coleman got in Defendant's car (254b-255b). There was a little boy in the car and another man (255b-256b). The little boy was Defendant's son (255b-256b). They were going to bond Gregory Rice out, but first they went by Defendant's house (256b-257b). They then dropped the little boy off at Yahnika Hill's house; Yahnika Hill was the mother of the little boy (257b). She did not know Yahnika Hill; she found out from Defendant that Yahnika Hill was the boy's mother (257b-258b). She also found out from Defendant that he did not like Hill; he told her that he wanted his child real bad, and that he had a case coming up and Hill was going to testify against him (258b). After dropping the child

off with his mother, they then dropped the other man off at a gas station (259b). She, Defendant, and Coleman then went to a bar to eat (259b). They then went to 1300 Beaubien (Police Headquarters) to bail Rice out (260b). Defendant gave her $700 for this purpose (260b-261b). Defendant gave her the money because Coleman said he did not have his I.D. on him, but she had hers (261b). She and Coleman got out of Defendant's car and went in the building to bond Rice out (262b). The officer told them that Rice also had a ticket, which would cost an additional $72 (262b). She and Coleman called Defendant at his house; Defendant had left her and Coleman at the police station (262b-265b). Defendant came to the police station with his girlfriend Nikki (265b). Nikki gave her $72, and she and Nikki both went into the police station to pay off Rice's ticket (265b). She was later questioned by the police in February of 1999 (266b).

Rodney Coleman testified that he was 21 years old (268b). He testified that he knew Defendant and Defendant's codefendant Gregory Rice, both of whom he identified in court (268b). He knew Defendant from the neighborhood and from going up to the barbershop with Rice, when Rice went up there to get his hair cut (269b). He met Defendant in 1994, and he had known Rice for about three years; he and Rice had been close friends (271b).

He testified that sometime near the end of September of 1998, he was up at the barber shop and had a conversation with Defendant; Defendant asked him to do a girl for him (273b). Defendant told him that he would pay him a "G" to do it (273b). What this meant to him was that Defendant wanted him to kill the girl (275b). At that time, he did not know Yahnika Hill (273b). He asked Defendant why he wanted the girl done and Defendant told him that the girl was testifying against him on a case, and that was why he wanted her done (275b). After he had this conversation with Defendant, he left the barber shop; he did not agree to kill the girl (276b).

In October of 1998, Rice was in jail (277b). Defendant came over to his house and asked him to bail Rice out of jail (277b). Defendant had never been over to his house before (277b). Defendant knew where he lived because Defendant had driven by his house before, at a time when he and Rice were standing outside in front of it, and Defendant stopped (277b). On the day Defendant came over to bail Rice out of jail, Defendant was in a brown Monte Carlo (278b). Defendant had his son and another man with him (278b). Defendant's son's name was Jaylin; the other man in the car was another barber at the barber shop (278b). Defendant did not tell him why he wanted to bail Rice out of jail (279b). He agreed to help get Rice out of jail because he and Rice were close friends (279b). Defendant drove him to the court; Marlynda went with them (279b-280b). By this time, Defendant had dropped his son off at the child's mother's house (280b-281b). When they got to where Rice was being held, Defendant did not go in; Defendant said he could not go in (280b). He and Marlynda went in, and the officer told them that there was a four hour hold on Rice, so that he could not be bonded out at that time (280b). The three of them went to get something to eat (282b). They then went back to the jail and Defendant dropped him and Marlynda off (282b). Defendant had given Marlynda $700 to bail Rice out (283b). This time, the officer told them that there was an additional $72 hold on Rice (283b). He and Marlynda went back outside; meanwhile, Defendant had come back with his girlfriend Nikki (284b). Nikki reached in her purse and gave Marlynda $72 (284b). Then, Marlynda and Nikki went in while he and Defendant stayed in the car (284b). The two women then came out with Rice (284b). Defendant then dropped him and Marlynda back at their house on Monica (284b).

Before September of 1998, Rice had been living with his grandmother (286b). After September, Rice became homeless (285b-286b). Sometimes Rice would stay with him, sometimes

he would stay with a person named Leon who lived down the street from him, and sometimes Rice would sleep in his car, a white Dynasty; this car was not running at the time (285b-286b).

During October of 1998, he saw Defendant and Rice; he saw Defendant when he would accompany Rice to get his hair cut at the barber shop where Defendant worked (287b). On some day in November, which he thought was probably November 23, 1998, he saw Rice (287b). Rice told him that he had killed a girl (288b). He and Rice were over at his (Coleman's) grandmother's house when Rice told him this (288b). He had gone over his grandmother's house to see if he could get some money from her, and Rice was over there, on the porch (289b). Rice looked troubled, and he asked Rice why he was looking like that (289b). Rice told him that he had come up upon a girl and had shot her in the face, while she was inside her car (290b). Rice did not say what kind of car it was, but he did say that it happened on the east side (290b). Rice told him that he did it by approaching the girl's vehicle and acting like he wanted to talk to her (291b). Rice told him that the girl pulled over to the side, and he got out and went up to her car and shot her in the face (291b). Rice said that he then ran back to his car and left (292b). Rice had a car at that time that he was driving, a GEO Tracker (290b). The day Rice told him this was the day it happened; Thanksgiving was on November 25 that year, and Rice told him this two days before Thanksgiving (292b). The witness then testified that he was walking his dog on November 23 and he saw Rice outside in the alley; Rice was trying to park a GEO Tracker in the alley (292b). He talked to Rice and Rice told him that he wanted to get something to eat (292b). They went and did that, and when they got done, Rice told him that the police were in the alley around the GEO Tracker, so Rice did not want to go back to the vehicle with the police there (292b-293b). That's when they went over to his grandmother's house, and it was there that Rice told him what had happened that morning (293b).

Rice did not say when the shooting occurred, but it had to have been around 7:00 a.m. because he was out walking his dog sometime after 8:00 a.m. (293b).

After Rice told him about shooting the girl, Rice would come by his house and tell him to keep his mouth shut about it and not to tell anyone (294b). There came a time when he told his aunt about what Rice had told him (294b); his aunt's name was Stephanie Harris (288b). He told her because he could no longer keep it on his mind (294b). There came a time, either February 10 or 11, when he spoke to Investigator Shaw about what Rice had told him (295b-296b). He was with Marlynda and Rice when three officers picked him up; they took him to the police station (295b). He told Shaw what he had told his aunt, and what he told Shaw was also what he was testifying to now (296b). He actually talked to Shaw twice (297b). The first time was when he got picked up and taken to the police station, and the second was when Shaw came to his grandmother's house on February 13 (298b-299b). He was released after he gave a statement on February 11; he went to his grandmother's when he was released (298b). After giving a second statement to Shaw on February 13, he stayed at his grandmother's house; he did not want to go back to his house on Monica because he was concerned for his safety (300b). It was after he gave his first statement that Defendant came over to his grandmother's house (301b). Defendant came over at about 9:00 p.m. (301b). His aunt answered the door (301b). He had told his aunt that he didn't want to be bothered with Jerome (Defendant); he didn't know what Defendant would try to do to him (301b-302b). Defendant asked his aunt if he was there, and his aunt told him that he was not (302b). He heard Defendant at the door, and he heard Defendant ask for him, and he heard his aunt tell Defendant that he was not home (303b). He heard his aunt tell Defendant that he was in jail (303b).

Finally, the witness testified that he was scared and that he felt caught between his friendship for Defendant and Rice and what the right thing was to do (304b). When asked if that affected how he testified on March 2, 1999 (at the preliminary examination), he responded that it made him nervous then, and he felt the same way now (304b-305b).

On cross-examination by codefendant Rice, the witness acknowledged that he had asked for money from Rice before; he testified that he felt he was justified in asking Rice for money because Rice had stayed at his house a number of times – this was in the summertime (306b-307b). He testified that the amount he borrowed from Rice was $60 total, which he didn't borrow all at once (311b). He denied having borrowed $300 from Rice (311b). Rice did not stay over at his house on a regular basis in October or November of 1998; rather, Rice stayed over at Leon's house, but occasionally Rice did stay at his house – it was his girlfriend who didn't want Rice over all the time (309b). Rice stayed with Leon until he moved back into his grandmother's house (310b). Rice did not move back in with his grandmother until after Thanksgiving (312b). The witness reiterated that two days before Thanksgiving, Rice had a GEO Tracker; when asked if he ever saw Rice actually behind the wheel of this vehicle, he responded that he did (313b-314b). He saw the police approach the Tracker after Rice parked it in the alley (315b).

On cross-examination by Defendant, Coleman testified that when Defendant offered him a "G" to do a girl, what this meant to him was that he was being offered a thousand dollars to kill a girl (317b).

Codefendant Rice called one witness and then testified himself. The witness he called was his grandmother, Grace Farmer. She testified that she lived on Monica Street (318b). She had one granddaughter living with her, and Rice lived with her off and on (318b). He was living with her

in November of 1998 (318b). She had house rules for the people who lived in her house (318b). The rules were that you had to be in by 11:00 p.m., unless you were working or unless you called her to tell you were not coming home (319b). Furthermore, there was to be no fornication or drugs in her house (319b). If one could not abide by these rules, he would have to leave (319b). She locked the door at 11:00 p.m.; she was the only one with a key (319b-320b).

Rice was living in her house during the week of Thanksgiving (321b). She remembered this because Rice wanted to barbecue on Thanksgiving, and she did not want to (321b). It was on Sunday that Rice said that he wanted a barbecue (322b). Rice left Sunday night at about 7:00 and did not come back until Monday morning between 3:30 and 4:00 a.m.; Monday was the 23rd (322b). She was up doing her meditation when Rice came home; she usually did her meditation between 4:00 and 6:00 a.m. (322b). She let him in when he came home (322b). Rice stayed in the house after that (322b). When asked about Tuesday night, the witness testified that Rice came in early that night, because on Monday, when he came in at 3:30 a.m., she reminded him about her house rules, and told him that if he wanted to live there he had to come in at a decent hour since he was not working; he obeyed the following night (322b-323b).

She testified that she knew Rodney Coleman (325b). He came walking by her house on the Monday of Thanksgiving week (324b). Rice walked out of the house and talked to Coleman; Rice and Coleman then had a heated argument about something (324b-325b). She did not know what the argument was about; they always had heated arguments (325b).

On cross-examination, the witness was asked where Rice was living on October 1 and October 13, 1998; she responded that she did not know (327b). She was asked about early November of 1998; she responded that Rice was in and out – there were several times he would

come in at about 5:00 a.m. (329b). On Monday the 23rd, when Rice came in at 3:30 or 4:00 a.m., she let him sleep until 10:00 a.m. or so (330b). He came home at that time because he was at Leon's house and Leon had to get up and go to work (330b).

Codefendant Rice testified that prior to finding out that Defendant cut hair, he knew who Defendant was but he had never conversed with him (342b). When he found out Defendant cut hair at a barber shop, he started going to the barber shop and getting his hair cut twice a week; and if he ever had an emergency, Defendant would come and cut his hair (342b).

Rice testified that he was aware of his grandmother's house rules and respected them; so, if there was ever a time that he wanted to do something with a female friend he would go to his friend Leon's house (343b-344b). He denied ever having slept in his car and he denied ever being homeless (344b).

There came a time when he needed to be bailed out of jail (344b). He could only make collect calls, so he first called people whose number he had in his memory, and, when he couldn't get through to any of them, he called Defendant because he had Defendant's card (345b). Most of the times he got in trouble he did not like to bother his family (344b). He told Defendant to go get some money from where he had put it (345b). He had stashed some money in his car, his white Dynasty (345b). This car was parked on Grove between Monica and Santa Rosa (345b). He had the money stashed in his car, as opposed to keeping it at his grandmother's house, because before, when he had let Rodney Coleman hold money for him, Coleman had taken it (345b). He had $630 stashed in his car; he was saving this money to get his car fixed (345b). He told Defendant that the money was stashed in the passenger side door of his car (345b). What he needed was $700 to get bailed out, but he actually needed $772 because he wasn't aware of the traffic ticket he had (345b).

When he didn't get bailed out right away, he called his mother and asked her to call Defendant to remind him about bailing him out (346b). Four hours later, Defendant and his girlfriend came in Defendant's car and eventually he was bailed out (347b).

When asked why he didn't call Coleman to have him get the money and bail him out, Rice responded that Coleman didn't have a phone and he didn't trust Coleman to get the money in any event (347b). When asked what his relationship with Coleman was, Rice responded that he had met Coleman because Coleman lived across the street from his grandmother (347b). He took a liking to Coleman and, because Coleman was younger, he tried to keep Coleman out of trouble (347b). He knew Coleman didn't have a job and Coleman and his girlfriend had a baby, and being the generous person he was, he would help them out, even though when he let Coleman hold money for him Coleman would take it; but, he never got upset with Coleman until Coleman denied owing him money (347b). He asked Coleman to pay back the money he owed him sometime after he got bailed out; by that time, Coleman's girlfriend had gotten a job (348b). Coleman asked him how much he owed him; when he told Coleman he owed him $260, Coleman denied owing him this much (348b). He quit talking to Coleman (349b-350b), and so he never talked to Coleman the week of Thanksgiving (350b). He denied ever seeing Coleman walking his dog or talking to him around that time and he never told Coleman that he killed a girl on the east side (350b-351b).

On cross-examination, Rice testified that he was not working in October or November of 1998 (351b). He was asked why he had not put his $630 in a bank; he responded that he had a large sum of money that he owed for college debts and credit cards, so he didn't put his money in a bank (352b). He testified that the reason he hid the money in the door of his car was because the car wasn't working and so there would be no reason for anyone to mess with it (355b).

Defendant called a number of witnesses. He testified as well. His first witness was Felicia Williams. She testified that Defendant worked at the hair salon she went to (356b). She testified that she had occasion to see Defendant once outside of his work environment (357b). This was at an afterhours nightclub, a blind pig, named "Babe's" (357b). This was around summertime (358b). She and her sister-in-law had just gotten out of the club around 6:00 a.m., and, as they were sitting in their vehicle, Defendant pulled up alongside of them and carried on a conversation with them (357b-359b). There was a vehicle behind Defendant's, and the person in this vehicle started honking the horn, as if to get Defendant to move his vehicle out of the way (359b). Defendant made a u-turn and the car made a u-turn and went in the same direction as Defendant (359b). Before Defendant took off, he told them that the person in the car behind his could be his baby's momma (359b-360b).

On cross-examination, the witness testified that she could not say who was in the car behind Defendant's (362b-363b). Nor could she give a description of the car; that is, she could not give the color nor could she say if it was large or small (366b).

The People accept Defendant's rendition of what Defendant's other witnesses testified to with the following exceptions and/or additions:

The People do not see in the transcript of Linda Hunter's testimony where Ms. Hunter ever gave the date when Defendant came and picked up Jaylin Knight (331b-339b).

With respect to Jania Knight's testimony, Ms. Knight testified on cross-examination that the reason she had to pick Jaylin Knight up from the victim was because there was a court order preventing Defendant from having any contact with the victim (367b).

Defense witness Seniqua Robinson testified that she was Defendant's girlfriend (368b). On cross-examination, she acknowledged that in October of 1998, she went to court or to the police station to bail out a person by the name of Gregory Rice (369b). She had never met Rice before that night (369b).

Defendant testified, on cross-examination, that it was in1996 that he acknowledged that Jalyn Knight was his son (371b). He acknowledged that he was not the person who went to court to arrange child support payments for his son, and it was not until the summer of 1998 that any type of formal payment arrangement was made (372b). Defendant also acknowledged that in October of 1998, he received a document from the Friend of the Court notifying him that he was in arrears on his child support payments in the amount of $796 (373b). He acknowledged that the victim, Yahnika Hill, brought this action to get past custody payments from him (374b-378b).

Also on cross, Defendant acknowledged that Yahnika Hill did not like the fact that when he had custody of their son Seniqua Robinson would be around (379b). He also acknowledged that when he worked at the barber shop, he would take his son there on the days he had custody of him; he denied that when his son spent time in the barber shop, his son would mimic the behavior and curse words at the barber shop (379b). Defendant admitted further that after one his son's visits with him, his son got ringworm (380b). Defendant did not recall if when he had custody of his son, his girlfriend ever spent the night (380b).

On the subject of Gregory Rice, Defendant was asked if Rice was a friend of his; he responded that Rice was a customer at the barber shop (381b). He then admitted that Rice was also a friend (381b). When asked if Defendant took it up himself to bail Rice out of jail, Defendant responded that he did not take it upon himself (382b). He then acknowledged that he did drive to

bail Rice out and that he took his girlfriend with him; she just happened to be with him and Rodney Coleman and Marlynda Mattison (382b-383b). Defendant acknowledged that his girlfriend gave Marlynda some money to bail Rice out when Rice was still in jail (384b). Defendant testified that sometimes his customers needed help and so it was out of the goodness of his heart that he bailed Rice out (384b). When asked if he got the money back that his girlfriend lent to Marlynda to bail Rice out, Defendant responded that he did – a friend of Rice's gave it to him (384b).

Defendant acknowledged that on November 23, he went and took his son out of school, without having told Yahnika Hill that this was what he was going to do; she came over later that day and was extremely upset (385b-386b).

Additional facts and/or excerpts from the lower court record will be found, where appropriate, in the following Argument(s).

Argument

A party may not use a peremptory challenge to remove a potential juror based on race, and when properly challenged, must provide a race-neutral reason for the removal. The prosecutor's reasons for removing two African-American jurors were that one juror was hesitant in responding to the question whether she could be fair and also had a relative who had been convicted of a drug offense, and the other had a daughter who was the age of the victim. The prosecutor's reason were credible and supported by the record, and so, assuming that the trial court found that the prosecutor had engaged in intentional and purposeful discrimination, the trial court erred.

A) Order Granting Leave to Appeal

This Court granted leave to appeal in this case limited to the following three issues pertaining to the jury selection: (1) the prosecutor's race-neutral reasons for dismissing jurors No. 2 and 9 were sufficient to avoid a finding of purposeful discrimination in the exercise of peremptory challenges; (2) the trial court correctly found that jury selection did not violate *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), because "the same number if not more" unchallenged African-American jurors remained on the jury that heard the case; and (3) the trial judge correctly continued the trial with the existing jury panel after she expressed dissatisfaction with the prosecutor's "race-neutral" reasons for excusing two African-American jurors who could not be recalled. (The People's Appendix, 10b;19b). The background of this Court's leave grant is as follows:

After the Court of Appeals rendered an Opinion in this case (The People's Appendix, 1b-5b), this Court remanded the matter to the Court of Appeals this Court. The reason for the Remand Order was that the Court of Appeals, in its Opinion dated October 15, 2002, had found that as to Defendant's claim of a *Batson* [*Batson, supra*] violation, the trial court had not abused its discretion in finding no pattern of discrimination. In fact, Defendant made *Batson* claims as to six jurors that

the prosecutor challenged peremptorily. The trial court upheld the prosecutor's peremptory challenges of four of the six jurors whose removal Defendant contested, but found that the prosecutor did not give a sufficient reason or reasons for the removal of Jurors Johnson and Jones; the problem was that when the trial court tried to get those jurors back, the court found that the jurors had already left and so were unavailable. Thus, as can be seen, the Court of Appeals made a factual error in finding that the trial court overruled Defendant's *Batson* claims as to all six jurors.

This Court, in its Remand Order (The People's Appendix, 6b), wished the Court of Appeals to address two issues, and, as the People read the Order, this Court's directive only pertained to the two jurors mentioned by name above, Jurors Johnson and Jones. The two issues posed by this Court were: (1) "whether the trial judge erred in finding a *Batson* violation," and (2) "[i]f [this] Court finds that the trial court did not err, the Court shall address whether the trial court was correct in ruling that the racial composition of the final jury cured any *Batson* violation that was not cured due to the failure to reseat the peremptorily dismissed jurors."

B) The People's Position

i) Jury Selection

So that this Court will not have to consider in a vacuum the prosecutor's conduct during jury voir dire, the People will provide a synopsis of what occurred, from the prosecutor's standpoint:

By the close of the first day of jury selection, the prosecutor had exercised two peremptory challenges (The People's Appendix, 27b-28b). On the following day, the prosecutor exercised two more (The People's Appendix, 31b; 36b). On the third day, the prosecutor exercised three more peremptory challenges (The People's Appendix, 39b-40b; 41b). It was after the prosecutor exercised the third challenge on the third day (making it a total of seven up to that point), counsel

for Defendant Knight lodged a *Batson* challenge to the prosecutor's exercise of her peremptory challenges, claiming that the prosecutor was discriminatorily excusing black jurors (The People's Appendix, 43b). The prosecutor responded, and the trial court agreed, that up to that point, she had excused one black male and two black females and three white males and one white female (Appendix, supra, 45b). The prosecutor then went on to volunteer her reasons for doing so (Appendix, supra, 45b-46b), and the trial court found that the prosecutor had not improperly excluded minorities from the jury panel (Appendix, supra, 47b). The prosecutor then peremptorily challenged four more jurors (Appendix, supra, 51b; 54b-55b; 56b). Another *Batson* challenge was brought, alleging that the prosecutor had improperly excused three black female jurors (Appendix, supra, 57b). Once again, the prosecutor volunteered her reasons for doing so (Appendix, supra, 57b-62b), and, as to jurors Johnson and Jones, the trial court stated, "I'm not satisfied with the prosecutor's response as to potential jurors Jones and Johnson. But I think they've already left." (Appendix, supra, 66b).[1] The court then told the parties to be more careful with the jury selection, and the court advised defense counsel that it would give the prosecution a cautionary instruction and would address any other remedy (Appendix, supra, 66b). Counsel for Defendant Knight asked the court if it would entertain calling down to the jury room, apparently to ascertain whether the challenged juror or jurors were still around (Appendix, supra, 68b). There was then a colloquy in which it was revealed that the jurors may have left the building (Appendix, supra, 67b). The trial court then stated, "I don't thin it is serious enough at this point. We do have some minorities left

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[1] The prosecutor also made a *Batson* challenge to Defendant Knight's exercise of peremptory challenges, which resulted in the dismissal of five white females (Appendix, supra, 62b-63b). The trial court never did rule on the prosecutor's *Batson* challenge.

on the jury panel and I'll be watching this closely." (Appendix, supra, 67b). The prosecutor exercised no more peremptory challenges after that.[2] After all of the parties expressed their satisfaction with the enpaneled jury, the trial court stated:

> [THE COURT]: I'm not going to swear the jury in until tomorrow morning.
>
> With the panel that we ended up with, I think that any *Batson* problems that may have been there have been cured.
>
> We have the same if not more jurors, African American female jurors on the panel as if we had kept Miss Christina Johnson and Miss Ruby Jones.
>
> I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case.
>
> (Appendix, supra, 71b-72b).

ii) Standard of Review

Review of the removal of Jurors Johnson and Jones would, it seems, be the de novo standard, i.e. whether it would have been proper to sustain the prosecutor's removal of those jurors. See e.g. *Tolbert v Page,* 182 F3d 677, 680, fn 5 (CA 9, 1999), citing *United States v Bishop,* 959 F2d 820, 821 fn1 (CA 9, 1992) ("Whether the justification offered by a prosecutor is an adequate race-neutral explanation is a question of law" reviewed de novo); *United States v Johnson,* 941 F2d 1102, 1108 (CA 10, 1991). Then, however, review of the trial court's ultimate factual ruling on whether the prosecutor intentionally discriminated is for clear error. *United States v Johnson, supra.*

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[2] The prosecutor still had nine (9) peremptory challenges. MCR 6.412(E).

iii) Discussion

a) Were the prosecutor's race-neutral reasons for dismissing jurors No. 2 and 9 sufficient to avoid a finding of purposeful discrimination in the exercise of peremptory challenges?

As noted, this Court's first inquiry is whether the prosecutor's race-neutral reasons for dismissing jurors No. 2 and 9 were sufficient to avoid a finding of purposeful discrimination in the exercise of peremptory challenges.

A *Batson* claim is analyzed in three steps. First, the defendant must make a *prima facie* showing that the prosecutor removed a potential juror for a discriminatory reason. If the defendant makes this showing, the second step requires the prosecutor to articulate a nondiscriminatory reason for the removal. Assuming that the prosecutor does so, the third step requires the trial court to determine whether the opponent of the peremptory strike has proven purposeful discrimination. *United States v Beverly,* 369 F3d 516, 527 (CA 6, 2004).

As to step one above, the prosecutor did not, when Defendant made a *Batson* claim as to Jurors Johnson and Jones, wait for the trial court to determine whether Defendant had made out a prima facie case of purposeful discrimination, but instead offered her explanations as to why she had dismissed these jurors. That being the case, whether a prima facie challenge under *Batson* actually existed is mooted by the prosecutor's voluntary explanation for striking the jurors. *Hernandez v New York,* 500 US 352, 359; 111 S Ct 1859, 1866; 114 L Ed 2d 395 (1991).

As to the second step of the process, the issue is the facial validity of the prosecutor's explanation. *Purkett v Elem,* 514 US 765, 768; 115 S Ct 1769, 1771; 131 L Ed 2d 834 (1995) Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be

deemed race neutral. *Id.* This second step does not demand an explanation that is persuasive, or even plausible. *Id.*

Here, the prosecutor's explanations for excusing the jurors were not facially discriminatory. They were as follows:

i) Juror Johnson

The prosecutor gave the following reason for dismissing this juror:

> [MS. MILLER] [Assistant Prosecutor]: Miss Johnson indicated that – looking at her body language when she was seated and the tone of her voice and the look that she gave when she indicated that she could be fair; she was hesitant in her demeanor. And she also indicated that she had a close relative that was convicted of a drug charge. And although she indicated that she could be fair, she was very reticent in terms of her demeanor.
>
> (Appendix, supra, 58b).

On further colloquy with the trial court, the prosecutor explained:

> Miss Johnson, in terms of her reticent demeanor, this is going to be a very interesting case for these people to decide in terms of who can stand up and who has a strong enough personality. In terms of her reticent demeanor, I'm not sure that she would stand up in a jury. She's barely is (sic) aubible when she speaks.
>
> (Appendix, supra, 62b).

As far as the relative convicted of a drug charge, the juror stated that this had been a first cousin, that the cousin was convicted, and that she had attended the court proceedings (Appendix, supra, 52b-53b).

ii) Juror Jones

The prosecutor gave the following reason for dismissing this juror in the following colloquy with the trial court:

> [MS. MILLER]: Miss Jones, the person that was last dismissed, is a person that has a child that's close in age to the victim in this case. She's a person that is a working person that is in some type of professional position at Blue Cross.
>
> In this case, we have a young woman who is not –
>
> THE COURT: So is Miss Berg, who is white. A white female.
>
> MS. MILLER: Right, that is correct. However, she has not indicated that she has a daughter that is of the age of the victim in this case.
>
> And Miss Jones is not similarly situated as our victim. She has a daughter that may be different from our victim. And she may view the life style of this victim and compare and contrast that with her own child. I don't think that that should enter into it. She indicated that she could be fair.
>
> But the reason that she was stricken is because this young woman whose life style in this case may be significant varying from her own daughter and from the background she is from. So therefore she was stricken.
>
> (Appendix, supra, 58b-59b).

At step three, the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. *Miller-El v Cockrell,* 537 US 322, 339; 123 S Ct 1029, 1040; 154 L Ed 2d 931 (2003). It was with this stage that the Court of Appeals, on remand from this Court, had a problem. And the problem stemmed from the rather confusing and contradictory record made by the trial court. As the Court of Appeals stated:

We have reviewed the transcript reference cited by the Supreme Court, which shows, according to the Supreme Court, that the trial judge was not satisfied with the prosecutor's race neutral reasons for peremptorily dismissing "several" jurors. The transcript reveals that the trial court was not satisfied with the prosecutor's reasons with respect to two prospective jurors, venirepersons number 2 and 9. In regard to venireperson # 9, there was never an objection by defense counsel when the prosecutor exercised her peremptory challenge, and venireperson # 9 left the courtroom. In regard to venireperson # 2, defense counsel did raise a *Batson* challenge immediately upon the prosecutor's exercise of a peremptory challenge. The jury pool was taken out of the courtroom while the parties addressed the *Batson* challenge. During this time period, venireperson # 2, apparently under the belief that she had definitively been discharged, left the building. While the trial court was dealing with the issue and arguments concerning venireperson # 2, it also stated that it had been concerned about the prosecutor's peremptory challenge of venireperson # 9; however, the court did not say anything at the time of the challenge because there had been no objection. The prosecutor proceeded to give a reason for discharging venireperson # 9. The trial court was not satisfied with the prosecutor's claimed race-neutral explanations as to both prospective jurors, but the court noted that they had already left the building.

The trial court indicated that it should have held the two prospective jurors. However, the court also stated that it did not think the problem was serious enough at that point in the proceedings. We note that the trial court did not make a specific finding that the prosecutor had engaged in purposeful discrimination . [Footnote omitted]. In fact, at the end of jury selection, the trial court stated that "I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case." The trial court also indicated that "any *Batson* problems that *may* have" occurred were cured in light of the ultimate racial composition of the jury. The trial court noted that "[w]e have the same number if not more jurors, African American female jurors[,] on the panel as if we had kept [the two prospective jurors]."

(Appendix, supra, 7b-8b).

What seems rather clear from a reading of the record is that the trial court never did state that it found the prosecutor's explanations to be incredible, i.e. that the prosecutor was not credible in saying what she was saying and that her explanations were a pretext for purposeful discrimination. But that was exactly the determination that the trial court was called upon to make. The trial court simply found the prosecutor's explanations to be unsatisfactory ("I'm not satisfied with the prosecutor's response as to potential juror[s] Jones and Johnson." (Appendix, supra, 66b). The court did not, however, take the next step required for a finding of a *Batson* violation. As the United States Supreme Court noted in *Purkett, supra*:

> At that stage [the third stage], implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
>
> 514 US at 514 US at 768; 115 S Ct at 1771. (Emphasis in original).

At least one court, the Fourth Circuit, has ordered a remand where the trial court did not engage in the analysis required by *Batson* and its progeny. Indeed, in *Jones v Plaster,* 57 F3d 417 (CA 4, 1995), the Court stated and held as follows:

> The ruling of the district court is so unclear that we cannot determine on the present record whether the ultimate conclusion of the district court to overrule Jones' objection may be sustained. First, the district court failed to rule squarely that it found that Thompson's strike of Preston was not motivated by a racially discriminatory purpose or even that the reason offered by Thompson was a truthful

> and race-neutral reason. Although the district court was entitled to consider the fact that the final jury included black citizens, *Grandison* [*United States v Grandison,* 885 F2d 143 (CA 4, 1989), *cert den* 495 US 934; 110 S Ct 2178; 109 L Ed 2d 507 (1990)] 885 F2d at 147; *United States v Lane,* 866 F2d 103, 106-107 (CA 4, 1989), it was not entitled to allow the presence or absence of other black jurors to resolve the question of whether Thompson was motivated by race in the exercise of this particular strike. *See Joe* [*United States v Joe,* 928 F2d 99 (CA 4, 1991), *cert den* 502 US 816; 111 S Ct 71; 116 L Ed 2d 45 (1991)] 928 F2d at 103. In addition, we cannot discern with certainty whether the district court ruled that Thompson was acting for a discriminatory purpose during the first round of jury selection, although we presume that it did or there would have been no legal justification to require the parties to proceed with peremptories a second time. And, during the second round of jury selection, the record does not indicate whether the district court ruled that Thompson, who apparently had just been found to have struck Preston for a discriminatory reason, had carried his burden of showing that he would have struck Preston even if he had not been motivated in part by an improper purpose. [Citation omitted]. Accordingly, on this record, we cannot determine whether the district court applied the proper legal analysis in reaching its decision to overrule Jones' objection, and we have no express finding by the district court on Thompson's motivation. Therefore, we remand for further proceedings in order for the district court to clarify its ruling and render a finding on whether Thompson's strike of Preston requires remedial action. We emphasize that this ruling need not be elaborate. The district court need only articulate whether the strike was exercised for a discriminatory purpose, and, if so, whether the strike would have been exercised even had a discriminatory purpose not been present.
>
> 57 F3d at 421-422.

That remedy may be futile or unreasonable in this case since it has been more than five years since the jury selection occurred in this case. In other words, it is likely that the passage of time has made a determination of credibility by the trial court improbable at this stage, especially where one factor by which credibility can be measured is the prosecutor's demeanor, *Miller-El, supra,* 537 US at 339; 123 S Ct at 1040. The trial court may simply not remember what the prosecutor's demeanor was

as a test of truthfulness and sincerity. *Miller-El, supra,* 537 US at 343; 123 S Ct at 1042-1043 ("the evidence presented to the trial court at the *Batson* hearing was subject to the risks of imprecision and distortion from the passage of time."). But the People do not read this Court's leave grant as being concerned any longer with the trial court's perspective. Indeed, in this Court's Order granting leave, the Court states that the leave grant is limited to the issue of "(1) the prosecutor's race-neutral reasons for dismissing jurors No. 2 and 9 were sufficient to avoid a finding of purposeful discrimination in the exercise of peremptory challenges," which differs from this Court's Order of Remand to the Court of Appeals in which this Court directed the Court of Appeals to consider (1) "whether the trial judge erred in finding a *Batson* violation" (Appendix, supra, 10b; 19b). The People will, at this juncture, address the question of whether the prosecutor's race-neutral reasons for dismissing jurors No. 2 and 9 were sufficient to avoid a finding of purposeful discrimination in the exercise of peremptory challenges.

iii) Juror Johnson

To recap, the prosecutor gave the following reason for dismissing this juror:

> [MS. MILLER] [Assistant Prosecutor]: Miss Johnson indicated that – looking at her body language when she was seated and the tone of her voice and the look that she gave when she indicated that she could be fair; she was hesitant in her demeanor. And she also indicated that she had a close relative that was convicted of a drug charge. And although she indicated that she could be fair, she was very reticent in terms of her demeanor.
>
> (Appendix, supra, 58b).

On further colloquy with the trial court, the prosecutor explained:

> Miss Johnson, in terms of her reticent demeanor, this is going to be a very interesting case for these people to decide in terms of who can stand up and who has a strong enough personality. In terms of her reticent demeanor, I'm not sure that she would stand up in a jury. She's barely is (sic) aubible when she speaks.
>
> (Appendix, supra, 62b).

As far as the relative convicted of a drug charge, the juror stated that this had been a first cousin, that the cousin was convicted, and that she had attended the court proceedings (Appendix, supra, 52b-53b).

a) Was the justification offered by the prosecutor an adequate race-neutral explanation as a matter of law?

The prosecutor gave three race-neutral reasons for excusing this juror, all of which were satisfactory to rebut a *Batson* violation. First was the conviction of the juror's first cousin and the fact that she was close enough to this person to have taken enough of an interest in the court proceedings to attend; the prosecutor could have legitimately surmised that the juror may be sympathetic to defendants in general. See e.g. *United States v Feemster,* 98 F3d 1089, 1092 (CA 8, 1996) (incarceration of a close family member is a legitimate reason justifying the use of a peremptory strike); *United States v Johnson, supra,* 941 F2d at1109, fn 4 (CA 10, 1991) (fact that close relative was once convicted of a crime is valid race neutral reason). Second was the prosecutor's perception that the juror's demeanor revealed hesitation when asked if she could be fair. This was likewise a valid reason for excusing the juror. See *United States v Hunter,* 86 F3d 679, 683 (CA 7, 1996) (upholding prosecutor's removal of juror for reasons stated by prosecutor, that he had a gut feeling about the juror based in part on the "extremely nervous," "hesitant," and "unhappy"

way she had answered voir dire questions); and see *United States v Jackson,* 50 F3d 1335, 1341 (CA 5, 1995) (prosecutor's perception that potential juror had given him a hostile look was sufficient neutral reason to utilize peremptory strike; reason was sort of intuitive judgment that courts generally must rely on counsel to exercise in good faith); see further *Brown v Kelly,* 973 F2d 116, 121 (CA 2, 1992), *cert den* 506 US 1084; 113 S Ct 1060; 122 L Ed 2d 366 (1993) (impression of conduct and demeanor of prospective juror during voir dire may provide legitimate basis for exercise of peremptory challenge; fact that prosecutor's explanations in face of *Batson* inquiry are founded on these impressions does not make them unacceptable if they are sufficiently specific to provide basis upon which to evaluate their legitimacy); and see *State v Murphy,* 829 SW2d 612, 614 (Mo App, 1992) (prosecutor's citation of juror's age, experiences of relatives having been involved in crimes, and demeanor of venirepersons during voir dire as reasons for striking four blacks exhibited no purposeful discrimination). And third was the prosecutor's perception that the juror did not have the type of personality where she would stand up for her own views. This was also a valid reason for excusing the juror. In *Washington v Johnson,* 90 F3d 945, 954 (CA 5, 1996), *cert den* 520 US 1122; 117 S Ct 1259; 137 L Ed 2d 338 (1997), the prosecutor's removal of a juror who the prosecutor felt had too strong of personality and would not deliberate with the other jurors was upheld as a race-neutral reason for removal of the juror. Here, the other side of the coin is presented, that is, a juror with a non-assertive personality who might not stand up for her own views, and it is just as true here that the prosecutor's reason was a race-neutral one.

iv) Juror Jones

The prosecutor gave the following reason for dismissing this juror in the following colloquy with the trial court:

> [MS. MILLER]: Miss Jones, the person that was last dismissed, is a person that has a child that's close in age to the victim in this case. She's a person that is a working person that is in some type of professional position at Blue Cross.
>
> In this case, we have a young woman who is not –
>
> THE COURT: So is Miss Berg, who is white. A white female.
>
> MS. MILLER: Right, that is correct. However, she has not indicated that she has a daughter that is of the age of the victim in this case.
>
> And Miss Jones is not similarly situated as our victim. She has a daughter that may be different from our victim. And she may view the life style of this victim and compare and contrast that with her own child. I don't think that that should enter into it. She indicated that she could be fair.
>
> But the reason that she was stricken is because this young woman whose life style in this case may be significant varying from her own daughter and from the background she is from. So therefore she was stricken.
>
> (Appendix, supra, 58b-59b).

a) Was the justification offered by the prosecutor an adequate race-neutral explanation as a matter of law?

The prosecutor's reason for removing the juror was valid as race-neutral, and not simply a pretext. In this case, the victim had been having sex with two men, Defendant and another man, and, at one point, she was not sure who the father of her child was. Juror Jones may have not approved

of the victim's life style from the standpoint of her own daughter, and may have thought in some way that the victim had brought about her own death, that is, that she was at fault for her murder. The People have found no case where a similar reason was given and upheld in response to a *Batson* challenge. This is of no consequence. An explanation for a particular challenge need not necessarily be pigeon-holed as wholly acceptable or wholly unacceptable. *United States v Alvarado,* 951 F2d 22, 26 (CA 2, 1991). And, again, the prosecutor's explanation, to satisfy *Batson*, need only be facially valid; it need not be persuasive or even plausible so long as it is race-neutral. *Purkett v Elem, supra*; *United States v Gillam,* 167 F3d 1273, 1278 (CA 9, 1999), *cert den* 528 US 900; 120 S Ct 235; 145 L Ed 2d 197 (1999).

There are also two instances in the record that lend credence to the prosecutor's explanation and her motive as to why she removed this particular juror.

Again, the prosecutor's concern with this juror was how the juror would perceive young people. Early on in the jury selection, another juror, one Mr. Sherman, advised the court that he had had problems with his son (Appendix, supra, 21b-22b). The juror then explained how he could not trust his son at all, and then he stated candidly as follows, "I think I do have a problem, if these young people remind me of some similar behaviors of my son. I think I would try to be fair but it's hard." (Appendix, supra, 23b). The prosecutor then had this colloquy with the juror:

> [MS. MILLER]: Mr. Sherman, in this case all of the people that are involved; the defendants, some of the witnesses that you are going to see are young people.
>
> And I'm directing this at you because of what you said about an experience quite a while ago that involved your son. You've had a chance to think about that.

> Having heard that you are going to hear from a number of witnesses that are going to be in their early twenties, probably, in this case does that affect you in terms of listening to the case and being able to be fair and impartial? Can you set your experience with your son aside?
>
> JUROR SEAT TEN: I'm not sure.
>
> MS. MILLER: Okay.
>
> JUROR SEAT TEN: I will try.
>
> MS. MILLER: We don't expect you to come up with an answer that we want to hear. But one that is a truthful answer that recognizes your experience.
>
> So what I'm hearing the best that you can say is that you would really try not to, but it might enter into something, possibly?
>
> JUROR SEAT TEN: I think I would have problems.
>
> MS. MILLER: Okay. Thank you for your honesty.

(Appendix, supra, 25b).

This juror was dismissed on the prosecutor's challenge for cause (Appendix, supra, 28b).

The other instance from the record is what Juror Jones said herself. On examination by Defendant Rice's counsel, counsel had this colloquy with Juror Jones (Juror No. 2):

> MR. SPICER: Let me ask you about your daughter. It's going to turn up in this case out that the young lady who was killed was in her early twenties, and she had a young son who was about three years old. Or is now about three. Would that affect you in anyway? Would you hold that against the defendants? Would you identify your own daughter in the place of the deceased or anything like that?
>
> JUROR SEAT TWO: No.
>
> MR. SPICER: No.

JUROR SEAT TWO: I hope not.

(Appendix, supra, 49b).

In its Opinion on remand, the Court of Appeals caught this as well; here is what the Court of Appeals said, "and venireperson #2 'hoped' she would not compare the victim top her own daughter who was about the same age as the victim." (The People's Appendix, 9b).

b) Did the trial court correctly find that jury selection did not violate *Batson, supra*, because "the same number if not more" unchallenged African-American jurors remained on the jury that heard the case?

As to this Court's second inquiry, the People once again note, as the Court of Appeals did in its Opinion on remand, that it is simply is not clear that the trial court found an actual *Batson* violation by the prosecutor. Assuming that the trial court found no violation, the trial court correctly considered the actual jury composition as a factor in its analysis of whether the prosecutor had violated *Batson*. See e.g. *United States v Grandison,* 885 F2d 143 (CA 4, 1989), *cert den* 495 US 934; 110 S Ct 2178; 109 L Ed 2d 507 (1990):

> While the racial composition of the actual petit jury is not dispositive of a *Batson* challenge, neither was the district court precluded from considering it. Here two of the twelve petit jurors were black. Although the presence of minorities on the jury does not mean that a *Batson* prima facie case cannot be made [citations omitted], the fact the jury included two black jurors is significant. [citations omitted]. This is especially so where, as here, the government could have used a remaining strike against those jurors but three times declined to do so.
>
> 885 F2d at 147.

In this case, as in *Grandison* above, the prosecutor had peremptory challenges left, nine of them in fact, which went unused. See also *United States v Lane,* 866 F2d 103, 106 (CA 4, 1989) (the district

court's reliance on the prosecutor's acceptance on the jury of two black jurors when he possessed sufficient peremptory challenges to strike them, although not conclusive, weighs heavily in support of the district court finding of no discrimination).

If, on the other hand, the trial court did find a *Batson* violation, but found it to be harmless in light of the fact that there were still black jurors on the actual enpaneled jury, there is support for the proposition that this cures a *Batson* violation. Indeed, in *Roman v Abrams,* 822 F2d 214 (CA 2, 1987), *cert den* 489 US 1052; 109 S Ct 1311; 103 L Ed 2d 580 (1989), the Second Circuit stated and held as follows:

> This conclusion does not, however, answer the ultimate question of whether Roman was entitled to have his conviction set aside. In assessing the propriety of habeas corpus relief, we are constrained to give some attention to the actual composition of the jury before which Roman was tried, for though the prosecutor acted improperly in attempting to eliminate Whites from the jury, he did not entirely succeed, and the jury actually came rather close to representing a fair cross section of the community in which the trial took place.
>
> We return to the principle that what the Sixth Amendment guarantees to a defendant is not that he will have a petit jury of any particular composition but that he will have the *possibility* of a jury that reflects a fair cross section of the community. The prosecutor violates Sixth Amendment rights when he starts out to eliminate that possibility, and it is incumbent upon the trial judge to apply the *McCray* Sixth Amendment principles during the jury selection process, and to grant the defendant an appropriate remedy when a prima facie case has been made of the prosecutor's racially discriminatory use of peremptory challenges and the state has not successfully rebutted that case by presenting creditable race-neutral reasons for the challenges. If the judge fails to act and if the prosecutor has succeeded in excluding a cognizable group from the jury by the discriminatory use of his peremptory challenges, that constitutionally guaranteed possibility has been artificially eliminated,

> and the defendant's constitutional right has been impaired. In such a case, a defendant is entitled to have his conviction set aside and to receive a new trial.
>
> Where, however, the actions of the prosecutor have not succeeded in excluding the targeted group and have not reduced the petit jury representatives of that group dramatically below the group's percentage in the venire or in the population of the community, it is difficult to see that the defendant has in fact been denied the possibility that the Sixth Amendment guaranteed him. Rather, if that group is not significantly underrepresented, it appears that the possibility constitutionally guaranteed to the defendant has come to fruition and that the defendant has therefore not been injured by the prosecutor's efforts to eliminate the cross-section possibility.
>
> 822 F2d at 228-229.

At least two states have adopted this approach. *Seubert v State,* 749 SW2d 585, 588 (Tex App, 1988) (if, despite State's unlawful peremptory challenge of black venireman on basis of race, blacks were not significantly underrepresented on jury compared to their percentage in group from which venire was drawn, State's unlawful challenges would be harmless error with regard to defendant's due process claim, that he was denied his right to jury comprised of fair cross section of the community by prosecutor's exercises of peremptory challenges); *State v Smith,* 737 SW2d 731, 733-734 (Mo App, 1987).

Other jurisdictions have held contra. See *United States v Johnson,* 873 F2d 1137, 1139-1140 (CA 8, 1989) (mere presence of two blacks on jury does not automatically negate *Batson* violation; *Batson* inquiry focuses on whether racial discrimination exists in striking of black person from jury, not on fact that other blacks may remain on jury panel); *State v Donaghy,* 171 Vt 435, 441; 769 A2d 10, 16 (2000) (after defendant established a prima facie case of gender discrimination in prosecutor's

use of peremptory challenges, trial court was required to complete the last two steps under *Batson,* requiring the prosecutor to offer gender-neutral reasons for his challenges, and making a final determination whether defendant had proven intentional discrimination; trial court should not have looked at the end product and deemed the jury "reasonably well-balanced" and then refused to strike the jury, in the interest of "judicial economy," essentially ruling that whatever discrimination occurred during jury selection was harmless error)[3]; *State v Clark,* 324 NJ Super 558, 569; 737 A2d 172, 179 (1999) (if any of prosecutor's peremptory challenges were racially discriminatory, that discrimination

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[3] Actually, the holding of this case was that the trial court could not dispense with the two second and third *Batson* steps simply because the ultimate jury contained minority members; in other words, the error was in not following the *Batson* steps.

Furthermore, the Court, in *State v Donaghy,* cited as support the United States Supreme Court Order in *Alvarado v United States,* 497 US 543; 110 S Ct 2995; 111 L Ed 2d 439 (1990). In the case below, *United States v Alvarado,* 891 F2d 439 (CA 2, 1989), the defendant had claimed that the government had used certain peremptory challenges to remove black jurors solely on the grounds of race, contrary to *Batson, supra.* The government asserted that the defendant had not made out a prima facie *Batson* error and that it had race-neutral reasons for each challenge. The Second Circuit Court of Appeals did not rule on these competing claims, for it held that no appellate inquiry was required into the merits of a *Batson* claim if the jury represented a fair cross-section of the community, as did this jury. In his petition seeking certiorari, the defendant claimed that the Court of Appeals had relied on an erroneous ground in rejecting the *Batson* claim and the government agreed, but argued what it had argued before, that the defendant had not made out a prima facie *Batson* error and that the government had given race-neutral reasons for each challenge, such that the Court of Appeals had reached the right result even if for the wrong reason. The Supreme Court Majority, over a dissent by four Justices, vacated the judgment of the Court of Appeals based on the government's concession that the Court of Appeals' judgment rested upon an improvident ground and remanded the case to the Court of Appeals to consider the position advanced by the government initially. As can be seen, the Supreme Court did not find that the Court of Appeals had erred; it simply based its Order vacating the Court of Appeals judgment on the concession by the government. The Order of the Supreme Court vacating the judgment thus cannot serve as precedent that a *Batson* error is never cured by a jury that represents a fair cross-section of the community. In other words, the People have never known a concession by the government in a case to be binding law.

could not be cured by prosecutor refraining from use of peremptory challenges to exclude black jurors during remainder of jury selection process).

The People assert that the former line of cases represents the proper view. As the Court noted in *Roman v Abrams, supra,* the Sixth Amendment guarantees a defendant that he will have the possibility of a jury that reflects a fair cross-section of the community. If the targeted group is not significantly underrepresented, such that the jury which is actually seated does reflect a fair cross-section of the community, Defendant's right has come to fruition, so that there really is no reason to give him the windfall of a vacation of his conviction and a new trial. Here, as the trial court indicated, there were African American females on Defendant's jury.

c) Did the trial court correctly continue the trial with the existing jury panel after it expressed dissatisfaction with the prosecutor's "race-neutral" reasons for excusing two African-American jurors who could not be recalled?

Assuming once again that the trial court did find a *Batson* violation, the appropriate remedy (or an appropriate remedy) would have been to reinstate the challenged jurors. *Batson, supra,* 476 US at 99, fn 24; 106 S Ct at 1725, fn 24. The trial court did actually attempt to do this, albeit belatedly, but the jurors had left the building. Upon learning that the challenged jurors could not be recalled, the court could have discharged the venire and called for a new venire. *Batson, supra,* 476 US at 99, fn 24; 106 S Ct at 1725, fn 24. The trial court did not do this. So, the trial court perhaps did err in continuing with the same jury venire from which the two jurors were challenged. The question becomes, what should be the appellate remedy.

As one federal jurist has observed, *Reyes v Greiner,* -- F Supp 2d -- (ED NY, 2004), 2004 WL 2059572 *16, citing and quoting from Eric L. Muller, *Solving the* ***Batson*** *Paradox: Harmless Error,*

Jury Representation, and the Sixth Amendment, 106 Yale LJ 93, 116-117 (1996), "the question of the appropriate appellate remedy for *Batson* error remains open." Quoting even more extensively from Muller, supra, the District Court in *Reyes* observed:

> The argument in favor of applying harmless error analysis to *Batson* errors is that the racially-motivated exercise of peremptory challenges violates the Equal Protection Clause right of an excluded juror, not the right of the defendant; by the time a case reaches its appellate stage, it is too late to rectify the harm done to the stricken juror. e significantly, the Supreme Court has rejected the notion that the commission of a *Batson* error deprives the defendant of an empirically reliable verdict-- that is, a verdict that "accurately describes the historical truth about the defendant's involvement in, and responsibility for, the crime." Muller, 106 Yale L J at 113. On his basis, without drawing any distinction between direct and collateral review, Professor Muller argues that there exists no rationale for appellate review of *Batson* errors. *See id.* at 118 ("A *Batson* violation causes harm, of course, but it does not cause harm to any value that appellate reversal exists to protect."). The premise of Professor Muller's argument is that "appellate reversal exists for one purpose only--to protect the reliability of the jury's 'factual finding' on the question of the defendant's guilt or innocence." *Id.* at 96.
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> * * * *
>
> On the other hand, when a party asserts a *Batson* objection at trial, a favorable ruling by the judge can avert the violation of the challenged juror's rights. On appeal, that is no longer possible. Because of this distinction, Judge Newman has argued persuasively that, even on direct appeal, "in those rare cases where the corrective action required to be taken by *Batson* during jury selection is not taken, the incremental benefit of enforcing *Batson* by reversing convictions obtained with fairly representative juries [is] not warranted." *United States v. Alvarado,* 923 F2d 253, 254 (CA 2, 1991) (Newman, J.).

Relief

Wherefore, the People respectfully request that this Honorable Court affirm the Judgment of the Court of Appeals.

Respectfully submitted,

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